matter to 'be referred'" for a formal ALJ hearing "'at the request of both parties.'" *Ibid.* (citation omitted). Under those circumstances, the court concluded that Section 28(b) provided the basis for an attorney's fee award.[7]

Unlike the parties in *National Steel*, petitioner and respondents did not participate in an informal conference, and thus the two cases do not squarely conflict. There is no way to predict how the Ninth Circuit would have decided *National Steel* had there not been an informal conference. If anything, the fact that the court relied on the conduct of the parties at the conference as evidence that a written recommendation would have been rejected suggests that the informal conference was critical to the disposition of that case.[8]

Moreover, in *Todd Shipyards Corp.* v. *Director, OWCP*, 950 F.2d 607 (1991), a case expressly relied upon by the court of appeals below (Pet. App. 14), the Ninth Circuit subsequently distinguished *National Steel* and clarified the congressional intent behind Section 28 in a manner consistent with the Fourth Circuit's decision here. In that case, the only disputed issue following the informal conference was the claimant's entitlement to an attorney's fee for services rendered before the conference ended; the parties had reached an agreement at the

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[7] Unlike in this case, *National Steel* proceeded to a formal hearing, after which the ALJ granted (and the BRB and appeals court affirmed) the higher compensation sought by the claimant. *National Steel*, 606 F.2d at 877-878.

[8] Petitioner errs in relying (Pet. 13-14) on a footnote in an unpublished decision, *Everitt* v. *Director, OWCP*, 107 Fed. Appx. 750, 753 n.4 (9th Cir. 2004) (citing *National Steel*, 606 F.2d at 882). An unpublished decision does not establish binding circuit precedent. See 9th Cir. R. 36-3.

informal conference on claimant's entitlement to disability benefits. 950 F.2d at 608. The court held that a fee award was not authorized in those circumstances, because Section 28(b) authorizes an attorney's fee only when the record shows that, following an informal conference, the employer refused to accept the written recommendation of the claims examiner. *Id.* at 610. The court distinguished the case from *National Steel*, in which the parties continued to dispute "liability on the amount of compensation to be paid *after the informal conference.*" *Id.* at 611 (emphasis added). The court explained:

> While we believe that the intent of Congress is clear from a plain reading of the words used in [Section 28(b)], the legislative history explains unequivocally the very limited scope of attorneys' fees awards under the statute.
>
> "A new provision is added dealing with cases where payment of compensation is tendered and an unresolved controversy develops about the amount of additional compensation, *despite the written recommendation of the deputy commissioner.* The provision directs an award of a reasonable attorney's fee . . . *where the employer or carrier has refused to accept the recommendation.* . . ." In all cases other than those specified above, attorneys' fees may not be assessed against the employer.

*Id.* at 610 (quoting H.R. Rep. No. 1441, *supra*, at 3). Not only does this explanation call into question the continued viability of *National Steel's* holding regarding the dispensability of the written-recommendation requirement, but the Ninth Circuit's analysis is completely consistent with the reasoning of the Fourth Circuit below.

3. Petitioner's assertion (Pet. 15-16) that the decision below conflicts with the Fourth Circuit's prior unpublished decision in *Newport News Shipbuilding & Dry Dock Co.* v. *Firth*, No. 96-2547, 1998 WL 29255 (Jan. 28, 1998) (134 F.3d 363 (Table)), is incorrect and undeserving of this Court's review. Even if true, an intra-circuit conflict, and particularly one in which a published decision purportedly conflicts with an earlier, unpublished decision, does not warrant this Court's review. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957); cf. 4th Cir. R. 36(b) and (c). In any event, the footnote in *Newport News* upon which petitioner relies is dicta, because the court ultimately held that Section 28(b) "is inapplicable and does not provide a basis for the ALJ's initial fee award." *Newport News*, 1998 WL 29255, at *3.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

HOWARD M. RADZELY
*Solicitor of Labor*
ALLEN H. FELDMAN
*Associate Deputy Solicitor*
NATHANIEL I. SPILLER
*Senior Counselor*
ROBYN M. SWANSON
*Attorney*
*Department of Labor*

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